

REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA AT NAIROBI
(Koome; CJ & P, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)

APPLICATION NO. 5 OF 2021 (E007 OF 2021)

CAPE HOLDINGS LIMITED..... APPLICANT

– AND –

SYNERGY INDUSTRIAL CREDIT LIMITEDRESPONDENT

*(Being an application for review of the Ruling of the Court of Appeal (**Okwengu, Musinga & Gatembu JJ. A**) delivered on 5th March 2021, denying certification and leave to appeal to the Supreme Court and stay of execution against the Judgment and Orders of the Court of Appeal (**M’Inoti, Sichale & Mohamed JJ. A**), delivered on 6th November 2020 and corrected on 29th January 2021, in Civil Appeal No. 81 of 2016.)*

RULING OF THE COURT

A. INTRODUCTION

[1] The Application before this Court is dated 10th March 2021, and lodged on 12th March 2021. It seeks to review the Court of Appeal Ruling delivered on 5th March 2021 denying certification and leave to appeal to this Court. The applicant further seeks stay of execution of the Judgment and Orders of the Court of Appeal delivered on 6th November 2020 and corrected on 29th January 2021 in *Civil Appeal No. 81 of 2016*, pending the hearing and determination of the instant application and the intended appeal.

[2] Consequently, the applicant brought a second Application dated 7th April 2021 under certificate of urgency seeking stay and conservatory orders restraining the respondent from executing the Judgment and Orders of the Court of Appeal in *Civil Appeal No. 81 of 2016*. On 13th April 2021 the Court (*Lady Justice Njoki, SCJ*) directed

that the application for stay and conservatory orders would await determination of the application dated 10th March 2021.

B. BACKGROUND

[3] A dispute arose between the parties herein which was referred to arbitration. On 30th January 2015 an award of Kshs. 1,666, 118, 183.00 together with compound interest was made in favor of the respondent. Consequently, two applications were brought before the High court, one for setting aside the award under Section 35 of the Arbitrations Act and another seeking recognition of the award. The High court in a Ruling delivered on 11th March 2016 set aside the award on the finding that the arbitral tribunal had exceeded its mandate in giving the award. Aggrieved, the respondent appealed to the Court of Appeal and in a Ruling delivered on 20th December 2016, the Court of Appeal found that it did not have jurisdiction to entertain the appeal.

[4] On appeal, this Court defined the parameters of appeal under Section 35 of the Arbitrations Act, set aside the Court of Appeal Ruling and remitted the appeal to the appellate court for determination on merit, this was however limited to the relevant issues that were identified for consideration. Upon hearing the appeal, the Court of Appeal found that the High court was not justified in setting aside the arbitral award on grounds that the arbitral tribunal had dealt with a dispute not contemplated by the parties or had gone beyond the scope of reference. It consequently overturned the High court and reinstated the arbitral award. Dissatisfied, the applicant moved the Appellate Court seeking leave and certification to appeal to this Court. In a Ruling delivered on 5th March 2021, the Court of Appeal declined to grant certification and leave on grounds that the intended appeal was not one involving matters of general public importance and that the Supreme Court had provided guidance on the issue of interpretation of arbitration clauses to determine whether an arbitral tribunal had exceeded its mandate.

C. THE APPLICATION

[5] The application is supported by the Supporting Affidavits of Elijah Mwangi and Vinay Sangrajka and a Supplementary Affidavit of Elijah Mwangi, all sworn on 10th March 2021. It is opposed by the Replying Affidavit sworn by Vishal Shah on 19th March 2021 and a Notice of Preliminary Objection dated 16th March 2021. The applicant filed its Written Submissions, List and Digest of Authorities dated 10th March 2021 on 12th March 2021 while the respondent filed its Submissions, List and Digest of Authorities dated 22nd March 2021 on even date.

D. THE PARTIES' RESPECTIVE CASES

(i) *The Applicant*

[6] The applicant urges that in the Ruling denying certification, the Court of Appeal was culpable of oversight in certain matters. It avers that the decisions in ***Synergy Industrial Credit Limited v. Cape Holdings Limited***; Petition No. 2 of 2017, [2019] eKLR (***Synergy Case***) and ***Nyutu Agrovet Limited v. Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)***; Petition No. 12 of 2016, [2019] eKLR (***Nyutu Case***) specifically concerned the question of parties' right of appeal to the Court of Appeal from the High court on decisions emanating from Section 35 of the Arbitration Act and that there still is uncertainty on the extent of intervention permitted under that Section. It is contended that a party who suffers an injustice before the High court and the Court of Appeal cannot be denied a right of appeal to this Court by merely relying on the two decisions.

[7] It faults the Appellate Court for failing to address the issue of perverted interpretation of the 14 written agreements and raises the following concerns; whether the Appellate Court or the High court could properly decline jurisdiction under Section

35 of the Arbitration Act where an arbitrator has committed gross injustice and perverted justice; whether the Court of Appeal decision overturning the High court amounted to an infringement of the applicant's right to a fair hearing and whether the arbitrator was entitled to make duplicated awards without intervention by the High court under Section 35 of the Arbitrations Act.

[8] The applicant further submits that this Court ought to grant leave and certify the matter as one of general public importance as the interpretation of arbitration agreement clauses is a consistent thorny issue in arbitration proceedings; that it has been subject to contradictory and inconsistent interpretation and application; that it is the root cause of most Section 35 of the Arbitration Act applications; that it is a novel issue which was not fully addressed in *Nyutu and Synergy Cases*; that it transcends many disputes currently pending in superior courts, and that the award together with interest constitute a substantial amount warranting the applicant to be granted a right to be heard by this Court.

[9] It is the applicant's further case that the Court; needs to provide guidelines on the courts' extent of intervention under Section 35 of the Arbitrations Act; clarify whether an arbitral tribunal can completely nullify written agreement in favour of oral agreement and still retain jurisdiction to determine the dispute referred to it; clarify whether arbitration proceedings can be premised on an oral agreement by dint of Section 4 of the Arbitrations Act; and whether the Court of Appeal severely restricted the jurisdiction granted to courts under Section 35. The applicant therefore submits that these issues transcend the specific proceedings herein requiring this Court to invoke its jurisdiction under Article 163 (4) (b) of the Constitution.

[10] Similarly, it is submitted that this Court issued specific directions and therefore retained residual jurisdiction to hear the intended appeal, especially where the Court of Appeal has acted unjustly. In conclusion, it relies on this Court's Decision in *Narok County Government v. Livingstone Kunini Ntutu & 2 Others*; Petition No. 3

of 2015, [2018] eKLR to urge that a party who has been denied justice has a right to approach this Court for correction of the injustice.

(ii) The Respondent

[11] In response, the respondent urges that this Court lacks jurisdiction to entertain the present application on the summarized grounds that the intended appeal does not raise constitutional issues or issues of general public importance as is a prerequisite under Articles 163 (4) (a) and 163 (4) (b) of the Constitution, the applicant has not sought or been granted certification and has failed to establish that it has satisfied the set criteria for certification.

[12] It is submitted that this Court has conclusively settled the law on arbitration and has established the guiding principles in the *Nyutu Case*, *Synergy Case* and *Geo Chem Middle East v. Kenya Bureau of Standards*; SC Petition No. 47 of 2019, [2020] eKLR (*Geo Chem Middle East Case*). The respondent urges that this Court granted superior courts a wide latitude and a filtering process to determine which matters would justify an appeal to the Court of Appeal under Section 35 of the Arbitrations Act. The respondent argues that the applicant misconstrued the judgment of this Court as having directed the Court of Appeal to determine the appeal in its favour, but on the contrary, that the issue for determination was whether the ruling setting aside the award was merited.

[13] As regards the proposed issues of general public importance, specifically, the law on interpretation of arbitration agreement clauses, the respondent urges that this Court in the *Nyutu*, *Synergy* and *Geo Chem Middle East Cases* has provided guidance on the parameters for intervention while dealing with an application under Section 35 of the Arbitrations Act. It submits that allegations of inconsistency or lack of clarity are not true, are unmeritorious, a gross abuse of the court process, a waste of judicial time and are dishonest assertions meant to avoid settlement of the award or to defeat the principle of finality in litigation. It is urged that none of the grounds relied by the

applicant meet the criteria for certification as was settled in *Hermanus Phillipus Steyn v. Giovanni Gneccchi-Rusccone*; Civil Appl. No. Sup.4 of 2012, [2013] eKLR (*Hermanus Case*).

[14] In conclusion, the respondent strongly contends that the Court of Appeal having heard and determined the appeal conclusively, the applicant has no further recourse to the Supreme Court. It relies on this Court's decision in the *Geo Chem Middle East Case* to support this submission. It emphasizes that matters originating from Section 35 of the Arbitrations Act must end in the Court of Appeal.

(E) ISSUES FOR DETERMINATION

[15] On the basis of the pleadings and submissions by the parties herein, we consider that two issues merit our determination, these are;

- (i) *Whether this Court has jurisdiction to hear and determine this application; and*
- (ii) *Whether the application meets the threshold for grant of review of certification.*

(F) ANALYSIS

(i) On Jurisdiction

[16] It is the respondent's preliminary objection that this Court lacks jurisdiction to entertain the instant application for reasons that the intended appeal does not raise constitutional issues or issues of general public importance. Further that the applicant has not sought or been granted certification and leave to appeal to this Court. It is the applicant's contrary case that the Court has jurisdiction to determine the application.

[17] With regard to this Court’s jurisdiction to review the Court of Appeal’s decision on certification, we have previously pronounced ourselves in the *Hermanus Case* as follows:

“[31] ...Consequently, it is our opinion that where one applies to the Court of Appeal for leave to appeal to the Supreme Court, and the Party is not satisfied by the decision of the Court of Appeal, “no appeal” lies. The only course is for the party to apply for review of the matter to the Supreme Court...

“[33] ..A party may come for review of the decision granting leave or denying leave. Hence, we hold that certification under Article 163(5) should be broadly read as alluding to certification by the court that a matter of public importance is involved, or is not involved...” [Emphasis added].

[18] It is not disputed that the applicant moved the Court of Appeal for certification and by a ruling delivered on 5th March 2021, the appellate court declined to grant certification, hence the instant application. In these circumstances, this Court has jurisdiction to hear the application. We now proceed to consider the substantive application dated 10th March 2021 on its merit.

(ii) Review of Certification

[19] It is the applicant’s contention that the motion is meritorious and raises issues of general public importance transcending the parties’ case. The applicant urges that the interpretation of arbitration agreement clauses has been subject to contradictory and inconsistent interpretation and application, is the root cause of most Section 35 of the Arbitrations Act applications and was not addressed in *Nyutu and Synergy Cases* which decisions it urges specifically concerned the question of parties’ right of appeal to the Court of Appeal challenging High court decisions originating from Section 35 of the

Arbitrations Act. It submits that in any case, there still are uncertainties on the extent of intervention permitted under that Section. It contends that these issues are novel and transcends many disputes pending in the superior courts requiring this Court to invoke its jurisdiction under Article 163 (4) (b) of the Constitution.

[20] The applicant additionally faults the Court of Appeal on various grounds including that: the award together with interest constitute a substantial amount; an arbitral tribunal cannot completely nullify written agreement in favour of oral agreement and still retain jurisdiction to determine the dispute referred to it; arbitration proceedings cannot be premised on an oral agreement by dint of Section 4 of the Arbitrations Act; and that the Court of appeal severely restricted the jurisdiction granted to courts under Section 35 of the Arbitrations Act.

[21] The respondent on the other hand, contended that the application fails to disclose any ground for certification. The respondent submits that this Court has conclusively settled the law on arbitration and has established the guiding principles in the *Nyutu, synergy* and *Geo Chem Middle East Cases*. It is the respondent's further submission that the applicant misconstrued the judgment of this Court as having directed the Court of Appeal to determine the appeal in its favour, and adds that the issue for determination before the Appellate Court was whether the ruling setting aside the award was merited. In addition, the respondent relies on this Court's decision in the *Geo Chem Middle East Case* and submits that the applicant has no further recourse to the Supreme Court as matters emanating from Section 35 of the Arbitrations Act must end in the Court of Appeal.

[22] On the merits of this application, this Court settled the governing principles for certification in the *Hermanus Case*. However, before applying the laid principles to the circumstances of this application, it is clear to us that the application before us is seeking certification and leave to appeal to this Court against a Court of Appeal judgment arising from a Section 35 of the Arbitrations Act Judgment of the High court.

In these circumstances, the Court *must first evaluate whether it has jurisdiction* to hear and determine such appeal.

[23] The legal position as regards this Court's jurisdiction to hear and determine appeals arising from a Section 35 of the Arbitration Act Judgment of the High court was settled in the ***Geo Chem Middle East Case***, wherein this Court found as follows:

*“41. Having so stated, we must reiterate that arbitration is meant to expeditiously resolve commercial and other disputes where parties have submitted themselves to that dispute resolution mechanism. The role of Courts has been greatly diminished notwithstanding the narrow window created by Sections 35 and 39 of the Act. To expect arbitration disputes to follow the usual appeal mechanism in the judicial system to the very end would sound a death knell to the expected expedition in such matters and our decisions in Nyutu and Synergy should not be taken as stating anything to the contrary. In this regard, one issue we did not pronounce ourselves on in the Nyutu and Synergy decisions, is whether a further appeal lies to this Court from a determination by the Court of Appeal. **For the avoidance of doubt, we now declare that in conformity with the principle of the need for expedition in arbitration matters, where the Court of Appeal assumes jurisdiction in conformity with the principle established in these two decisions, and delivers a consequential Judgment, no further appeal should ordinarily lie therefrom to this Court.**”*

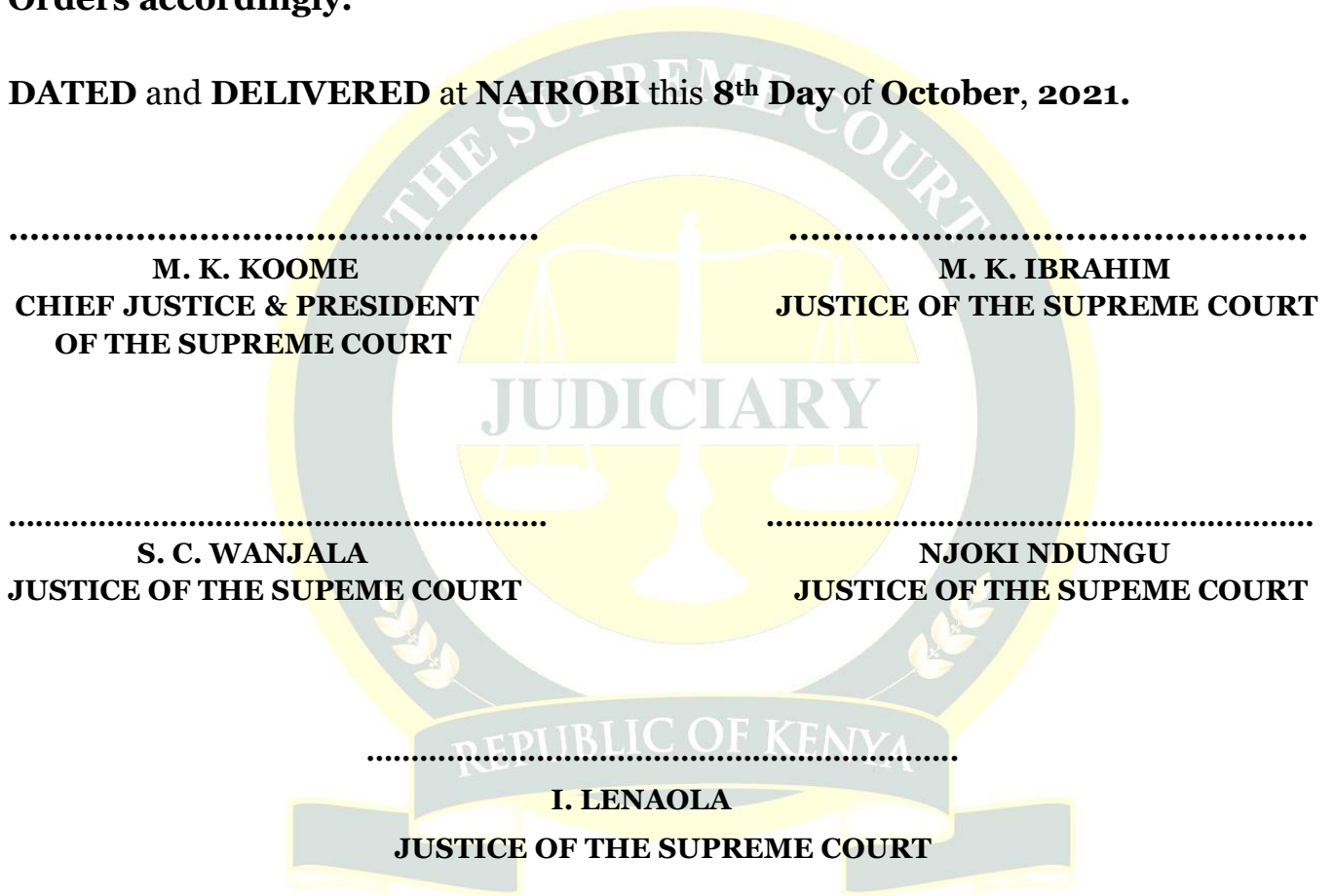
[24] We reiterate our holding in the ***Geo Chem Middle East Case*** and find that this Court lacks jurisdiction to entertain this appeal as it is challenging the Court of Appeal judgment, where the Court of Appeal assumed jurisdiction in conformity with the principles established in the ***Nyutu and Synergy*** decisions and delivered a consequential Judgment.

[25] Having so found, we have no hesitation in declaring the application before us is one for dismissal. We consequently make the following orders:

- (i) *The Notice of Motion dated 10th March 2021 and filed on 12th March 2021, be and is hereby dismissed; and*
- (ii) *The applicant shall bear the respondent's costs.*

Orders accordingly.

DATED and DELIVERED at NAIROBI this 8th Day of October, 2021.



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M. K. KOOME
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT

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M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA